Filed 6/30/09 P. v. Simpson CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RON LEE SIMPSON, Defendant and Appellant.	G040654 (Super. Ct. No. 06NF4278) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Joe T. Perez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Ron Lee Simpson admitted he violated the terms of his probation by failing to appear in court pursuant to an order that he do so. But he challenges the revocation of his probation on the ground he was denied due process because he was not given written notice of the claimed violation on which his probation was revoked, i.e., his failure to appear. We conclude defendant expressly waived his right to a formal revocation hearing on the claimed probation violation; he was adequately advised of the charged probation violation; and the rights accorded him complied with "equivalent due process safeguards." (*People v. Vickers* (1972) 8 Cal.3d 451, 458.) Accordingly, we affirm.

FACTS

After defendant pleaded guilty to one count of possession of methamphetamine, and admitted having suffered a prior prison term within the meaning of Penal Code section 667.5, subdivision (b), the court suspended imposition of sentence and placed defendant on probation for three years, conditioned on his participation in a drug treatment program pursuant to Penal Code section 1210 et seq. We affirmed the judgment, and the remittitur was issued on September 6, 2007. (*People v. Simpson* (June 29, 2007, G038035) [nonpub. opn.].)

On September 11, 2007, the Orange County Probation Department filed a petition for arraignment of defendant on a probation violation alleging he had been arrested on August 26, 2007 for possession of drug paraphernalia. Defendant's probation was summarily revoked, but the arraignment on the probation violation was continued many times. Defendant was present with counsel at each of eight different dates on which his arraignment had been set. But on May 27, 2008, defendant failed to appear.

Consequently, a bench warrant was ordered issued and held to May 28, 2008. Defendant failed to appear on May 28 and the warrant was released.

On June 2, 2008, defendant, now in custody, appeared with his counsel for arraignment on the probation violation. The record is truncated. But it appears there were some discussions off the record between the court and counsel, because the transcript begins with counsel advising the court she had "explained to Mr. Simpson the court's offer with regard to the resolution of the bench warrant and future resolution of the outstanding harbor court misdemeanor case and he would like to go forward with the admission at this time."

The court then explained the terms of the "offer." The explanation was not, shall we say, a model of clarity. The court did make clear, however, that it was adding its own allegation that defendant's failure to appear on May 28 was an additional ground for revoking his probation, and that defendant could plead to that single allegation and defer disposition of the alleged probation violation based on the August 2007 drug paraphernalia charge. After defendant expressed some confusion, and the court gave him the opportunity to consult further with counsel, the following ensued:

"The Court: Mr. Simpson, it is alleged you are in violation of your probation, sir. There are two allegations: One that you bench warranted from this court on 5/28/2008. There was a bench warrant hold issued on 5/27/08 to 5/28/08.

"It is also alleged, sir, you are in violation based on a new charge out of Harbor Court 08HM07334 [*sic*]. I indicated to your attorney that if you wanted to admit that you are in violation based on the bench warrant we would go forward with that, understanding that if you are found not guilty of the charge and the People do not plan to proceed on a probation violation against you based on that new charge that that would not be part of it; however, if you are convicted or if the People do wish to go forward on a probation violation and that is proven, then that would be part of this admission.

"Do you understand that, sir?

"The Defendant: Yes, sir.

"The Court: The question becomes do you give up your right to have a formal hearing on this matter and admit that you are in violation of your probation based on your failure to appear to this court on 5/28/08; yes or no?

"The Defendant: Yes, sir.

"The Court: Counsel joins?

"Ms. Johnson [defense counsel]: I do."

The court found the admission to be knowing, intelligent and voluntary. Based on the admission, the court revoked defendant's probation and reinstated probation on condition that he resume the Penal code section 1210 drug treatment program.

DISCUSSION

Defendant's sole argument on this appeal is that he was not given *written* notice of the ground on which his probation was revoked, and this asserted failure violated his right to due process. Defendant's argument relies on one of the due process rights accorded a defendant in probation revocation proceedings established in *People v. Vickers, supra,* 8 Cal.3d 451. In *People v. Santellanes* (1989) 216 Cal.App.3d 998 the court restated those rights succinctly: "Before probation can be finally and formally revoked written notice of the claimed violation must be given to the probationer, the evidence against him must be disclosed, he must be given an opportunity to be heard in person and to present witnesses and documentary evidence, he must be able to confront and cross-examine adverse witnesses, a neutral and detached hearing body must consider the matter, and a written statement of the fact finder must be prepared as to the evidence relied upon and the reasons for revocation." (*Id*. at p. 1003.)

The very description of a probationer's rights under *People v. Vickers, supra,* 8 Cal.3d 451, reveals that these rights govern the conduct of a proceeding in which

defendant contests the alleged probation violation and desires a formal hearing. But a probationer is entitled to waive a hearing and admit the violation. (*In re La Croix* (1974) 12 Cal.3d 146, 153 ["We have no doubt that the right (to a hearing) may be expressly waived and it may be deemed to have been waived when a (probationer), with knowledge of the right, fails to assert it in a timely manner"].) Here, defendant expressly waived his right to a formal hearing and admitted the violation. We perceive no unfairness in the lack of a *written* notice of the violation. The new allegation was not complicated. Quite simply, defendant had failed to appear in court after being ordered to do so. He was told his failure to appear was the new violation, and, while represented by counsel, he was asked whether he wanted a hearing on that allegation or whether he wished to admit it. If he wished to present evidence of a valid excuse for his failure to appear, he could certainly have asked for a hearing. But he did not do so. In any event, his decision not to request a hearing, choosing instead to admit the violation, could not have been caused by the lack of a *written* notice.

The cases relied upon by defendant are inapposite. He first relies upon *In re Moss* (1985) 175 Cal.App.3d 913. In *Moss*, defendant was asked whether he admitted violating the terms of his probation that had been imposed in three cases. The court did not, however, identify those cases, nor did it tell the probationer what the charges were. (*Id*. at p. 929.) The Court of Appeal noted: "An accused's right to notice of pending charges is hardly a new concept in this state." (*Id*. at p. 930, fn. 9.) Here, in contrast, the court described for defendant the two separate alleged violations of his probation in the only case for which he was on probation, and asked defendant whether he wished to give up his right to a formal hearing, and whether he wished to admit the single alleged violation of failing to appear in court.

Defendant also relies upon *People v. Mosley* (1988) 198 Cal.App.3d 1167. In *Mosley*, the jury acquitted the defendant of rape, but at the conclusion of the trial, the court nevertheless determined defendant was in violation of his probation because the

evidence at the rape trial disclosed he had consumed alcohol. Consumption of alcohol was prohibited by the terms of his probation. But until the evidence was concluded in his rape trial, and the jury was deliberating, the consumption of alcohol had not been charged as a violation of his probation. The court nevertheless relied on the evidence establishing the defendant's consumption of alcohol to revoke his probation. All of that evidence was taken during the rape trial before defendant or his counsel knew that the court would rely on the uncharged consumption of alcohol as a basis to revoke his probation, and thus had no motive or reason to cross-examine with that purpose in mind, or to call additional witnesses. The circumstances in *Moseley* were thus far removed from the instant case in which defendant was advised of the charge, was told he could have a formal hearing, asked whether he wished to give up that right and admit he had failed to appear in court after being ordered to do so. Defendant expressly waived his right to a formal hearing and admitted the violation.

In sum, the proceedings here did not violate defendant's due process rights. He was accorded "due process safeguards" (*People v. Vickers*, *supra*, 8 Cal.3d at p. 458) equivalent to those due probationers desiring to contest a probation violation in a formal hearing.

DISPOSITION

The order is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.